SUPREME COURT OF THE UNITED STATES.

No. 339.

THE UNITED STATES, APPELLANTS,

vs.

ALBERT L. MOWRY.

APPEAL FROM THE COURT OF CLAIMS.

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1 In the United States Court of Claims.

No. 1871.

Petition.

To the Judges of the United States Court of Claims:

The petition of Albert L. Mowry, of Cincinnati, State of Ohio, respectfully sheweth:

That heretofore, to wit, on or about the twenty-second day of September, one thousand eight hundred and sixty-one, at St. Louis, Missouri, your petitioner contracted with the United States to make and deliver to them fifty box-cars and fifty platform cars, the box cars to be similar to those known on the Pacific railroad as accommodation freight cars, to be built in the most substantial manner, according to the plans and specifications to be furnished by Captain Castle, and to his acceptance, and his decision thereon to be final between the parties; fifty of the said cars to be delivered within eighteen, and fifty within thirty days, on the track of the Pacific railroad, free of expense to the United States.

And it was further agreed that your petitioner should make and deliver as many more of like cars as the United States might require, within forty days.

And it was further agreed between your petitioner and the
2 United States, that they should pay him, at the office of the United States Quartermaster at St. Louis, Missouri, eight hundred and twenty dollars for each of said box cars, and seven hundred dollars for each of said platform cars, when so delivered and accepted.

And your petitioner further avers, that he proceeded to fulfill said contract by building and delivering to the United States, under the same, fifty box and fifty platform cars, which were inspected, accepted, and received by the United States in comformity with the provisions of the said contract, and gave vouchers therefor in due form, and they appropriated and applied the said cars to their own use.

And your petitioner avers, that the United States did not require him to make and deliver any further number of cars under said contract.

And your petitioner further avers, that there remains due from the United States to him, on account of the said cars so sold and delivered, and received under the said contract, the sum of seventeen thousand five hundred dollars, over and above all payments made to him thereon, and over and above all just set-off, with interest from the time of the delivery of said cars; and he prays this court to adjudge that the United States pay him that sum, with interest thereon from the day of delivery until paid.

And your petitioner further avers, that he made due demand at the office of the quartermaster aforesaid at St. Louis, and caused due

demand to be made at the War Department, of payment of the moneys above claimed, and that at both places such payment was refused.

And he further avers, that he is the sole owner of this claim, and prosecutes the same for his own benefit.

A. L. MOWRY.

R. H. GILLET,
Solicitor, and of Counsel for Petitioner.

STATE OF OHIO, *City of Cincinnati, ss :*

Albert L. Mowry, the above-named petitioner, being duly sworn, doth depose and say that he has read the foregoing petition, and understands the matters therein stated, and that they are true, as he verily believes.

A. L. MOWRY.

Subscribed and sworn to before me, this 22d day of September, 1862.

ALEX. PADDOCK,
Probate Judge in and for Hamilton County, Ohio.

3 ALBERT L. MOWRY
vs.
THE UNITED STATES. } No. 1,871.

And now comes the said claimant, and by leave of the court amends his petition, and says:

"That the said claimant is a citizen of the United States; that he has at all times borne true allegiance to the government of the United States; and that he has not in any way aided, abetted, or given encouragement to any rebellion against the said government."

STATE OF NEW YORK, *City and County of New York, ss :*

Albert L. Mowry, the above-named claimant, being duly sworn, says that his petition in the above-entitled cause, as proposed to be amended as above, is true, and the above amendment states the truth.

ALBERT L. MOWRY.

Subscribed and sworn to before me, this 23d day of March, 1867.

CEPHAS BRAINERD,
Commissioner of U. S. Court of Claims.

4 In the Court of Claims.

ALBERT L. MOWRY
vs.
THE UNITED STATES. } No. 1,871.

And now, to wit, 25th of March. 1867.

The court, upon due examination of the premises, do find in favor of the claimant, and do order, adjudge, and decree, that the said Albert

L. Mowry have and recover of and from the United States the sum of seventeen thousand five hundred dollars, ($17,500 00.)

BY THE COURT.

5 Court of Claims.

ALBERT L. MOWRY *vs.* THE UNITED STATES. } No. 1,871.

The United States, by E. P. Norton, its Solicitor, makes application to the honorable Court of Claims for an appeal of the case of Albert L. Mowry *vs.* The United States, to the Supreme Court of the United States.

E. P. NORTON,
Solicitor for the U. S.

Filed in the clerk's office June 10, 1867.

6 At a Court of Claims held at the Capitol, in the city of Washington, on Tuesday, the 25th day of June, A. D. 1867,

ALBERT L. MOWRY *vs.* THE UNITED STATES. } No. 1,871.

SAMUEL J. MORGAN *vs.* THE UNITED STATES. } No. 1,872.

OLIVER H. GEFFROY *vs.* THE UNITED STATES. } No. 1,873.

BENJAMIN HIGDON *vs.* THE UNITED STATES. } No. 1,874.

Mr. Norton presented to the court, in the above-entitled cases, his application for an appeal, respectively filed therein in the clerk's office on the 10th of instant, June, from the judgment respectively entered therein on the 25th of March last, to the Supreme Court of the United States: Whereupon, the claimants, by their counsel, Messrs. Carlisle and McPherson, filed objections to the allowance of the same, and the several cases were submitted.

7 At a Court of Claims held at the Capitol, in the city of Washington, on Wednesday, the 26th day of June, A. D. 1867;

ALBERT L. MOWRY
vs.
THE UNITED STATES. } No. 1,871.

Ordered, that the petition for an appeal filed in this case by the Solicitor for the United States, be allowed.

8 The facts found by the Court are—

First. That in September, 1861, the cars contracted for were needed for immediate use on the Pacific Railroad in Missouri, for the transportation of men and supplies in the military operations of the Department of the West, then in command of Major General Fremont.

Second. That the Pacific Railroad Company had not the cars needed for immediate use, and could not furnish them because it had not the pecuniary means, and that the cars could not be purchased in the market, nor obtained except by contract for their construction.

Third. That on the twenty-second day of September, 1861, a contract was made in writing, and under seal by J. McKinstry,
9 Brigadier General and Quartermaster, for and in behalf of the United States of the first part, and by the petitioner of the second part, whereby it was agreed, 1st, That the petitioner should furnish to the United States fifty box cars, and fifty platform cars, to be built according to the plans and specifications to be furnished by Captain Castle, strictly to his acceptance, and whose opinion as to the workmanship, &c., was to be final between the parties. 2nd. That fifty of said cars were to be delivered in eighteen days, and fifty in thirty days, on the track of the Pacific Railroad Company, free of expense to the United States, and as many more as the party of the first part may require, in forty-five days from the date of the contract. 3d. That the petitioner should be paid at the Quartermaster's office in St. Louis, Missouri, eight hundred and
10 twenty-five dollars for each of the platform cars, at the time of their delivery and acceptance by Captain Castle.

Fourth. Under this contract fifty box cars and fifty platform cars were built by the petitioner and delivered by him, and approved by Captain Castle and received and taken into use by the United States, who required no more cars of the petitioner under the contract.

Fifth. That by his performance of his contract, the petitioner became entitled to receive from the United States, and they became liable to pay to him the contract price for the cars delivered and accepted, amounting to $76,250.

11 Sixth. That the petitioner presented his claim to a Commission appointed by the Secretary of War, composed of Messrs. Davis, Holt, and Campbell, and they allowed him thereof the sum of $58,750, and gave him their voucher therefor, on the condition that he should sign a receipt and agreement in the words follow-

ing, viz: "The undersigned acknowledges to have received the vouchers referred to and described below, which, when paid, will be in full of all demands against the United States, on account of the respective claims set opposite their several names."

12 Seventh. That the petitioner protested against the action of said Commission in requiring the agreement and receipt aforesaid, and signed the agreement under said protest.

Eighth. That on the said voucher received from the said commissioner there has been paid by the United States to the petitioner the said sum of $58,750, leaving unpaid the sum of $17,500.

And as a conclusion of law the court finds, that as the contract in this case was duly made with the petitioner by the officer of the Quartermaster's Department on the part of the United States, and was duly performed by the petitioner, he is entitled to the balance claimed in the contract of seventeen thousand and five hundred dollars, and that he is not barred from its recovery by the agree-

13 ment required of him by the commissioners as above stated.

14 In the Court of Claims.

ALBERT L. MOWRY
vs.
THE UNITED STATES. } No. 1,871.

I, Samuel H. Huntington, chief clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, and of the final judgment of the court thereon; of the application of the Solicitor of the United States for the allowance of an appeal, as filed in the clerk's office on the 10th of June, 1867, and presented to the court on the 25th of June, 1867, and of the order of the Court allowing the same, and of the finding of the facts in the case by the court, and the conclusions of law on said facts on which the court founds its judgment.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court, at Washington, this 6th day of December, A. D. 1867.

[SEAL.]

SAM'L H. HUNTINGTON,
Chief Clerk Court of Claims.

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, A. D. 1868.

Brief in behalf of the United States in the following cases:

No. 186. THE UNITED STATES *vs.* ALBERT G. MOWRY.

No. 191. THE UNITED STATES *vs.* SAMUEL J. MORGAN.

No. 192. THE UNITED STATES *vs.* JONATHAN P. BURTON.

No. 193. THE UNITED STATES *vs.* OLIVER H. GEFFROY.

No. 197. THE UNITED STATES *vs.* BENJ. HIGDON.

Which cases are each brought into this court from the Court of Claims, by appeal in behalf of the United States from judgments rendered in each of the cases in favor of the appellee, who was claimant in the court below.

STATEMENT OF FACTS IN MOWRY'S CASE.

On September 22d, 1861, Mowry made a contract with McKinstry, quartermaster at St. Louis, to furnish 50 box cars and 50 platform cars, to be built under direction and to the satisfaction of one Captain Castle; 50 of said cars were to be delivered in 18 days, and 50 in 30 days, on the Pacific railroad track, and petitioner was to be paid $825 *for each of the platform cars* at the time of acceptance by Castle.

Under this contract 50 box cars and 50 platform cars were built by Mowry, delivered, approved and taken into the use of the United States, and the court below say he thereby became entitled to the *contract price*, which they say amounted to $76,250. (Marg. page 10, record.) The court does not find the actual *value* of the cars. (Remark. It is not perceived how 50 platform cars, at $825 each, could amount to $76,250; my arithmetic makes it $41,250. *By the contract stated in the record*, while the claimant was to make and furnish 100 cars, he was to be compensated for the whole by receiving $825 apiece for 50 of the cars, otherwise there was a contract price for the *platform* cars and no price fixed for the box cars.) Claimant presented his claim before the St. Louis commission, and they allowed him $58,750.

He had *no vouchers* from any quartermaster, but his claim rested on the contract and proof of performance.

The commission gave him a voucher for $58,750, on condition that he would sign a receipt and agreement reciting the receipt of the voucher and stipulating that, when paid, the $58,750 should be in full of his whole claim; and claimant signed the agreement under protest and accepted the voucher, and afterwards was paid the $58,750 under the resolution of Congress, and this suit is brought to recover $17,500 more.

STATEMENT OF THE FACTS.

In cases of Morgan, Burton, Geffroy and Higdon:

In August, 1861, General Fremont, commanding the department of the west, without lawful authority appointed John E. Reeside a purchasing agent to buy horses for the use of the army.

Each of these claimants sold and delivered horses to Reeside at a fixed price agreed to by Reeside, and took from Reeside vouchers in form substantially alike, of which the following is a specimen:

THE UNITED STATES TO S. J. MORGAN, DR.

Oct. 5th, 1861. To 154 horses, at $130 each $20,020 00

I certify that I have inspected and approved the above number of horses for Samuel J. Morgan, contractor for purchasing horses for the army of the United States, in the western department, and that the above account is correct and just.

J. E. REESIDE,
Inspector of Horses for the Western Dep't U. S. A.

OCT. 5, 1861.

The horses above were delivered to the quartermaster of the 2d regiment Ohio volunteer cavalry, for use of that regiment.

J. E. REESIDE.

I certify that the above account is correct and just, and that the articles will be accounted for on my property return for the quarter ending on the 30th day of September, 1861.

W. W. McFARLAND,
Quartermaster 2d Regiment Ohio Vol. Cavalry, U.S.A.

All these horses went into the use of the United States, being used in the military service.

The value of the horses was equal to the contract price.

The United States refused to pay the amounts promised in these vouchers, and referred them to the St. Louis commission, who deducted $15 per horse from the amounts claimed, and allowed the balance; and before delivering to said claimants said vouchers re-

quired the same agreement, viz., to accept the amount so allowed in full of the whole claim.

Subsequently the sums allowed by the St. Louis commission were paid, under the resolution of Congress above referred to, and claimants gave *a receipt in full* of the whole claim. For form of this last receipt see page 6, in the Morgan record, (Marg. page 10.)

REMARKS.

Each one of all these claims, when submitted to the St. Louis commission, was an unadjusted, unliquidated demand. Its amount was in good faith disputed by the United States. It was a matter open to adjustment and settlement by negotiation.

After examination the commission, in behalf of the United States, offer to claimant a less sum than he claimed, on condition that he will accept it in full satisfaction of his whole demands. He protests that the sum offered is not enough, but accepts the offer, signs the agreement, and Congress steps in and authorizes the fulfilment of this agreement on the part of the United States, and the agreement is carried out and the money paid. The authorities quoted in the Adams case show that each of these claimants is concluded thereby.

T. LYLE DICKEY,
Assistant Attorney General.

O

OPINION OF THE U. S. COURT OF CLAIMS,

DELIVERED BY

HON. C. C. NOTT,

IN THE CASE OF

CHILD, PRATT & FOX vs. THE UNITED STATES.

This is an action brought to recover for army supplies sold at St. Louis, in 1861, and the amount claimed is $163,111.00.

The story of the case is such as must admonish one—if the admonition can be needed—of the true value of those rules of human action which we term law, and it may also awaken in the mind of him who may peruse it, a desire for the return of that deep reverence for both the form and the authority of law, which under the name of "law-abiding" has been the characteristic trait of the American people.

In a great civil war the government must reach its ends, by speedy rather than certain means, and in the train of evils by which great civil wars must be accompanied are cases of human rights adjudged by other rules than those which are administered by courts of justice. How great the value of the law, with all its tardiness, its uncertainties, and its defects, and how false and valueless are all other tests for measuring men's rights, and how insecure would life and liberty and property become were military discretion or governmental arbitrators to take the place of the slow measures of the law, the cases of which this completes the class, may well illustrate.

The case is this: In August and September, 1861, General Fremont, commanding the "Department of the West," and Major McKinstry being his Chief Quartermaster; all of Missouri save the great rivers and railways being in the possession of the enemy, and her chief city threatened by both revolt and invasion, the merchants of St. Louis were as a class afraid to trust their government. Among the exceptions was the house of Child, Pratt & Fox, which from the first stood with unwavering faith for the government, and which alone of the great commercial houses of St. Louis dared to hang out the American flag at the memorable time when the decision of the ever lamented Lyon saved the city, by destroying the rebel force that under the guise of a State guard was drilling in her suburbs. This house determined to stand or fall with the government Once the resident partner seems to have hesitated and to have appealed to his senior, in New York, for instructions. The answer came by telegraph, "Sell the government to the last dollar; we ship you heavily to-day." The house did so, and on the — October, 1861, it held a balance of unpaid quartermasters' vouchers amounting to $478,110.62.

The history of the unfortunate administration of General Fremont has been sufficiently treated in the decisions of this court. When its downfall came, and public suspicion fastened upon everything connected with its financial management, the claimants as among its largest contractors were also among the most suspected. A detachment of the provost guard suddenly took possession of the claimants' office; their safe was broken open, their papers scattered on the floor, their business books of account opened to the inspection of government occountants, and their unpaid vouchers handed over to the "*Davis, Holt and Campbell Commission.*"

The records of this commission illustrate afresh the benefits conferred upon those few portions of mankind where life and liberty and property are guarantied by that "due process of law" which places the rights of the citizen above the power of the government. The commission could not have been more discreetly chosen. The first, an eminent jurist, who for many years had been respected as a just and learned judge within his own State, and whose talents now adorn what, in Constitutional power is, the highest judicial tribunal in the world. The second had been a faithful and distinguished member of the Cabinet in the most dangerous hours of our national peril; and who has since administered the military justice of the United States as Judge Advocate General. The third was a merchant of St. Louis; eminent as a merchant, a friend of the government, and distinguished for culture, ability, and probity.

No three men could have been found in this country of varied experience, ripened judgment, high attainments, and lofty personal characters, better fitted to administer exact and immediate justice untrammelled by the tedious formalities and unyielding precedents of the law. Yet when these three gentlemen, whose whole lives had taught them the great lesson of respecting individual rights, left the beaten path of the law and essayed to do justice by other tests than those of legal experience, their decisions became of that character which we have been accustomed to regard as dangerous to all civil rights when witnessing their action under despotic governments. This military commission teaches to American citizens the lesson that Constitutional liberty consists not alone in a republican form of government, nor in legislative representation, nor in the frequent choice of a chief ruler, nor of all of these combined, but in that firm belief in the sacredness of law which alone can assure mankind of security of life, or liberty, or property.

In this case the proceedings of this commission were substantially the same as in the numerous class which have already come before the court. The claimants' private book, which merchants proverbially guard with jealous care, were thrown open to a stranger selected exclusively by the commission. This accountant was not subjected to cross-examination, nor were his investigations tested by the usual principles of the law of evidence. No counter-testimony was allowed to be given by the claimants, nor were they heard in their own defence. On the report of the accountant, which was partial in regard to the extent of the transactions and imperfect in the manner of computing and stating the claimants' profits upon the goods sold, an arbitrary deduction was made. Further deductions were also made "as reclamations for other claims of said Child, Pratt & Fox held by their assignees and allowed in full." The vouchers of the claimants were then mutilated, by making these deductions, in red ink upon their face. Finally the vouchers were forcibly withheld from the claimants until they consented to sign a receipt, not under seal and expressing no consideration, which provided that when these altered vouchers should be paid the payment should be "in full of all demands against the United States." (See the *Fremont Contract Cases*, 2 C. Cls. R., p. 34).

It is needless for this court to review its decisions upon this subject. These arbitrary and *ex parte* deductions made by the commission standing by themselves, cannot be upheld by any principle of law or justice with which we are acquainted. We have admitted in evidence the proceedings of the commission and the receipts or releases of the claimants, and have

endeavored to give to them all the weight which has been claimed for them. But we find them worthless in law; the former because Congress alone had power to constitute boards of arbitration, and consent is an essential element of arbitraments; the second because they were without consideration and exacted by the duress of the claimants' vouchers.

Yet it has been urged with great earnestness by the Assistant Attorney General, that the *Joint Resolution 11th March*, 1863, (12 Stat. L., p. 615) and the subsequent acceptance of the amount awarded and receipts of the claimants ratify and render legal the acts of the commission. This joint resolution provides "That all sums allowed to be due from the United States to individuals, companies, or corporations, by the commission heretofore appointed by the Secretary of War, for the investigation of military claims against the Department of the West * * * now sitting at St. Louis, Missouri, shall be deemed to be due and payable and shall be paid by the disbursing officer, either at St. Louis or Washington, in each case, upon the presentation of the voucher with the commissioners' certificate thereon, in any form, plainly indicating the allowance of the claim, and to what amount." At the time this resolution passed the disbursing officers, knowing no law for making such reductions upon vouchers given by the proper officers of the government and in due form, had refused to pay the awards of the commission. The joint resolution declares that the "*sums allowed*" "*shall be deemed to be due*," and directs the disbursing officers to pay them. This is all that the joint resolution does. It in no manner provides that the acts of the commission shall be deemed legal, like the acts and resolutions ratifying the various proclamations of the President, nor in any way repudiates the legal liabilities of the United States for the balances left unpaid. It would be difficult to draught an act which would provide for the payment of the amounts found to be due by the commission, and leave all other questions more completely untouched and undisturbed.

But apart from any legalizing effect of the joint resolution the fact remains that the claimants did present their mutilated vouchers for payment, and did voluntarily sign a second series of receipts, whereby they acknowledged having received the reduced amounts "in full of the above account."

Of these receipts two things may be said: In the first place the acts of the commission had taken from the claimants their business books of account; had suspended their business transactions; had reduced them to the verge of bankruptcy; and had been constantly met by the claimants' repeated and most earnest protests. At the same time they had no legal redress; for this court as re-constituted by the *act 3d March*, 1863, (12 Stat. L., p.) did not then exist. The law does not require needless acts, and a fresh protest in March after all their repeated protestations during the preceding three months, and after the orders of the War Department prohibiting the payment of their accounts, would have been a useless formality. The defendants did not proffer the payment as a compromise; the claimants did not profess to receive it as such; and it appeared on the face of the papers at the less sum received for the greater had been an exaction of the defendant's agents and was no act of the claimants.

In the second place, before these receipts were given and after the reductions had been made by the commission, it appears that the accounts were in the office of the Quartermaster General and that each bears this endorsement:

"Referred to Major M. S. Miller, qnartermaster, for payment, under the joint resolution of Congress approved March 11, 1862.

M. C. MEIGS,

MARCH 19, 1862. *Quartermaster General.*"

The payment therefore professed to be nothing more than a payment under the joint resolution, and that resolution, as we have seen, provided only for the payment of the part found to be due by the commission. Major Miller, therefor, could not have paid the remaining part, and the receipt given therefor, under those circumstances, was clearly without consideration and wholly void.

There is one more point of law to be considered before we reach the merits of the case. These purchases were not made by advertising previously for proposals as required by the *Act 2d March*, 1861, (12 Stat. L., p. 220, §10). That act provides that when an immediate delivery "is required by the public exigency the articles or service may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold or such services engaged between individuals." At the time of these purchases this court has found that there was a "public exigency" existing of the gravest and most urgent character, and the government and every officer of the government had so declared. The question therefore is whether the articles were procured by open purchase in the places and in the manner in which such articles are usually bought and sold between individuals? By this we presume is meant articles bought and sold *under like circumstances*. That is to say, the statute requires of a quartermaster buying supplies in such an exigency that openess, diligence, prudence, and care which an individual might be supposed to give were he buying goods in just such an exigency and amid just such circumstances.

The circumstances amid which these purchases were made are thus detailed by the chief quartermaster of the department:

"Volunteer troops commenced to arrive here from the whole of the northwest, without any intimation to me of their expected arrival, and the instant they landed on the levees of the city my office was besieged by colonels of regiments and regimental quartermasters demanding, on the instant such supplies as were necessary to enable them to go into camp—for instance, tents, camp-kettles, axes, spades, and so on—what was termed camp equipage in the army regulation. Their requisitions would be accompanied by an order from General Fremont to furnish instantly the articles required, the troops meanwhile standing formed, in the sun, in the street.

"The department had no supplies on hand. I made an effort at General Fremont's adjutant general's office to ascertain how many troops he expected, where they were to come from, and when they would arrive, with a view of sending a requisition to Washington city, knowing that the articles called for were not in the west. General Fremont and none of his staff could give me the informotion required; each Governor of a State, acting independently of him, raising troops and forwarding them here without notice to him. From the best information I could obtain in that way, I estimated for about 90,000 men, and made requisitions upon the head of my department in Washington city in accordance with such estimate, both by letter and telegraph, stating that the articles that would be required were not to be had in the west, and suggesting that the clothing department in

Philadelphia be ordered at once to provide these articles. I was informed in reply that the department could not meet the requisitions that were being made by the army of the Potomac; that the preservation of the Capital was deemed of more importance than the State of Missouri; that their entire time and attention was devoted to meeting requisitions made upon them; that they couldn't do it; that General Fremont had full power, and that I, as his chief of the Quartermaster's Department, must use my own judgment, and do the best I could towards meeting the wants of the troops.

"The department here was without supplies of any kind, and without a dollar in money A large portion of the State of Missouri was in the possession of the rebels; the city of St. Louis virtually so.

"By way of illustration of the exigencies of the service: As late as 5 or 6 o'clock in the evening, steamboats would arrive here with thousands of volunteer troops. They would be landed on the levee, and in most instances marched up in the neighhorhood of my office, and the necessary supplies to put these men into camp, give them a supper, and a blanket to sleep on, would be immediately demanded of me. I had as many as a dozen gentlemen in my employ, whom I would instantly start in every dtrection in this city to hunt these supplies, my purchases not at all being confined to the house of Child, Pratt & Fox.

"The first thing they had to do on their landing on the levee at the city, and before they could move from there, was to call on General Fremont and myself for these supplies. That was their first duty, and, as a consequence, their requisitions were in within an hour after their arrival. Most of these troops—the troops from other States—arrived by steamer, without any previous intimation of their arrival to me or to anybody, and the first notice that General Fremont or myself would have, in most cases, of their arrival, would be the appearance of the colonel and regimental quartermaster of the regiment; and their first business was to make known their wants for tents, clothing, cooking utensils, and all that sort of thing. They would make out a requisition—the regimental quartemaster would—signed by the colonel, or commanding officer, of the regiment. To that requisition would be appended General Fremont's order on myself to furnish without delay. I would be compelled to answer that I did not have the articles; and I invariably took the colonel to task for not notifving the department here of their intended arrival, in order that I might have time to provide for their wants; and I endeavored, by talking with General Fremont and his staff, to impress on them the importance of making known to the Governors of the respective States the necessity of their posting this department of their inientions to send troops here.

"Before these troops could move from the levee or from the front of my office to comp, they were compelled to have the articles called for, and I would be ordered by Gen'l Fremont to purchase or get them in any shape, form, or manner—in the best manner I could.

"The first thing required was covering, in the shape of tents; transportation, in the shape of mules and wagons to carry them to camp; camp-kettles, mess-pans, for cooking purposes; axes, spades, shovels, for camp purposes; and clothing, shoes, stockings, drawers, shirts, pants, coats, blankets; and I was compelled, in many instances.

"To show that exigency I will state that on the 29th of July, 1869, I was ordered to have at command, during the next fortnight, clothing, camp

and garrison equipage for twenty-three regiments of infantry, three regiments of cavalry, and one regiment of artillery—about 28,000 men. On the same day I was directed to purchase 500 sets cavalry equipments for to-morrow, (August 20.) I was ordered to purchase in this city, August 20, and have ready to forward at once, clothing for 6,000 men; August 21, to purchase 1,000 pairs of pants and the same number of jackets; September 4th, to contract for not less than 1,000 wagons and mules required for these 6,000, with the least possible delay."

The manner in which the chief quartermaster procured the supplies was this: After applying to the Quartermaster General at Washington, and being informed that all supplies there were needed for the defence of the Capital, and that he must procure them as best he could, he thus proceeded:

"When a requisition was made on me, a copy of that requisition was pasted on a bulletin-board that I had on the outside of my office, (my office always being surrounded by hundreds,) making known that I wanted immediately such and such articles—that being the nearest approach, under the circumstances, that I could make to the requirements of the law. That bulletin-board, together with the efforts of these messengers of mine, sent out to hunt up supplies in the city, was the only means of advertising that I had.

"The vouchers pending before this court, to which my name is affixed, were all critically examined by me I was satisfied that the house of Child, Pratt & Fox, according to these vouchers, were charging but a reasonable profit, and I know and swear that there was no collusion between us."

The question was asked him, "What, if any, inquiries did you make to ascertain whether army supplies, such as were needed in this department, could be obtained at that time in adjacent cities or States this side of the Alleghany mountains?"

"Answer. I made inquiry by letter, by telegram, by sending agents and officers of the department under me to Cincinnati, to Cleveland, Detroit, Chicago, and even Peoria, Illinois, and all other villages where I had reason to suppose one bale of blankets or one package of shoes could be obtained.

"Question. After making all the inquiries you have stated, state whether or not you gained any information that enabled you to procure the necessary and needed articles either quicker or cheaper than you did procure them from Child, Pratt & Fox?

"Answer. I sent agents to Montreal and Quebec; I bought everywhere and anywhere that I could; I had the Canadas searched for blankets. I reported to the chief of the department in Washington city the wants of this department, and I nsed every exertion by telegraph, by letter, by agents, and by the exercise of the military power conferred on me as provost marshal, to obtain army equipments, and I failed in almost every instance outside of the city, because the ground was covered by other quartermasters, including the Quartermaster General from Washington, and I had remonstrances addressed to me by the quartermasters of Cincinnati and Chicago, and if there were any supplies there they wanted them themselves, and that I ought not to trench on their grouud. I did not get supplies from all the places I have mentioned but in limited quantities, and at higher rates than I paid Child, Pratt & Fox."

But as the wants of the department increased, and the supplies in St.

Louis diminished, the chief quartermaster was compelled to resort to stil different means, which are thus described in his testimony:

"Question. Before or at the time you ordered or purchased clothing, hardware, boots, and equipage of any kind of Child, Pratt & Fox, did you make, or cause to be made, an examination or inquiry throughout the city of St. Louis as to the character and quantity of army equipage that you could obtain in the St. Louis market?

"Answer. I did. I made it in person and through my agents. I believe it to have been a thorough canvass of the whole city.

"Question. In the purchase of these articles and equipage which are in controversy in this claim, state whether there was any inspection or examination of the goods that were purchased by Child, Pratt & Fox before the vouchers in question were made and delivered to them?

"I have no particular recollection of these particular vouchers, but in all cases, after a thorough canvass of the city spoken of in my previous answer, and finding that the materials required were not in the city, and after I had endeavored to obtain from headquarters the probable number of troops that would be concentrated here, I submitted to General Fremont, in writing, a memorandum of what I doemed necessary to be done. I have a correct copy of that memorandum before me. It is as follows:

'*Memorandum for Major General Fremont, by J. McKinstry, A. Q. M.*

'The chief quartermaster, after careful consideration of the probable wants of the army now being organized under your command, would respectfully recommend that he be ordered to enter into engagements for the immediate supply of the following articles on the following terms, to wit: the parties receiving the orders to repair at once to New York, and after consultation at the office of the quartermaster in charge of the clothing depot in that city, and receiving from him samples of the articles required, to agree to furnish a sworn list of the prices at which the several articles will be furnished, giving in detail the cost of materials and workmanship, the same in no case to exceed the ruling market prices, together with a fair market profit to the contractors; the list or list to be so prepared as to

General Fremont approved this plan, and the chief quartermaster then made this agreement with Mr. Fox, one of the claimants' house

"I stated to him that I had authority as provost marshal to seize whatever supplies I required, but I was satisfied that it would not work, as I stated before, it would prevent supplies coming into the city the minute I attempted it. I told him I should require him to furnish me with whatever goods he had, and all he could get; that I would exercise a rigid scrutiny of his acounts; that under these emergencies I would allow him a fair mercantile profit, and the business before this court now commenced. With that understanding, the business included in this account now in suit, as I perceive by the petition in this case, now before me, began.

"Mr. Fox told me that their business was that of hardware; that if an attempt was to be made by him to furnish anything else, he must consult partners resident in New York. The result of that conversation was, as I was informed, was an agreement to establish his army supply business.

"I examined his invoices, I made an estimate of the cost of his doing business, aided by my cashier, and the vouchers that I signed and gave him

for goods were based upon that accurate examination, and my firm conviction then was, and it is now, that he charged only a reasonable profit.

"I believe this to have been the commencement of Child, Pratt & Fox's dealing in army supplies, other than those of their regular business.

"Child, Pratt & Fox furnished me with many of the articles covered by these vouchers in question. I followed out the rule laid down in the above memorandum. I saw in many instances in the original invoices, the extraordinary charges for express freights, and the various expenditures required in furnishing at so short notice the clothing and articles required. I had my cashier critically examine them, I had my chief clerk do the same, and then I examined their examination, and I affixed what I deemed a fair mercantile profit, and gave the house of Child, Pratt & Fox a voucher covering that amount.

"I will state also that I had no standing order with Child, Pratt & Fox; I bought of them as the exigences of the service required, and that if I could have done so, I would have entered into contracts for the purchase of what the army would require; and in the prices to the articles in these accounts; and I repeat that every voucher to which my name was affixed was carefully and closely scrutinized, with all the facts and circumstances attending the purchases before me, in many instances I having the original invoices of purchases abroad, and that I allowed the fair, usual, and customary mercantile profit, and no more, with the full conviction, on my part, that many months must elapse before the government could pay that money."

These being the facts, we think that the chief quartermaster acted much as an energetic business man would have acted in his own business if acting without money, with shaken credit, under a pressing exigency, and in a place where but a part of his needs could be supplied. Publicity and competition were the leading objects of the statute. Reviewing his proceedings now, we do not perceive in what way the chief quartermaster could have made the purchases in a more open manner, or could have secured to the government a nearer approach to direct competition. If he did all he could, under the circumstances, to attain these two ends, then the conditions of the statute are fulfilled; for the statute intended that, in a proper exigency, supplies for the army should be procured, and that they should be procured by lawful means; and it was never intended to be construed as declaring contracts illegal which, as nearly as possible, comply with its requirements. A statute relating to national exigencies must needs be very liberally construed.

But this case can form no precedent for other cases; for the great and awful exigency which threatened to destroy the national life cannot, we trust, ever be repeated. What was right and lawful for a quartermaster to do, under such circumstances, can be right and lawful only when the circumstances are repeated. Thus believing, we hold that the form of the purchases in this case was not necessarily illegal, and that their legality depends upon their *bona fides*.

The transactions of Child, Pratt & Fox came into this court clouded with a public suspicion which may well exact the severest judicial scrutiny. Moreover, the chief quartermaster, by whom the purchases were made, has since been dishonorably dismissed the service of the United States for frauds found to have been practiced by him upon his government. The case, therefore, has been examined with more than usual deliberation. After one

trial it was sent back to the docket, in order that it might be heard before a full bench. The delay has also given to the defendants the benefit of fresh legal ability, and enabled them to reprobe the evidence with all the legal ability of the Attorney General and his learned Assistant. After all this we are astonished to find how little appearance of

The first fact which the evidence discloses is that these goods were sold in the darkest hour of the rebellion, and in a city whose fate was, of all the cities in the land, the most uncertain. The goods, moreover, were bought by the claimants for gold and sold to the government for irredeemable quartermaster-vouchers. Some previous vouchers, too, had been paid in the half worthless paper money borrowed of the St. Louis banks, but those to follow, including these in suit, had not even that assurance, and were to be held as uncertain evidences of debt until the government should be able and willing to redeem them. The government's gold-bearing bonds had fallen more than *fifteen per cent.*, and its paper money had not yet been issued. The value of the vouchers, therefore, in gold, could only be estimated by finding the depreciation of government bonds, gold-bearing, and clothed with all the evidences of national faith that could be bestowed upon such securities; and then estimating a further deduction for these vouchers bearing no interest, redeemable in such money as the government might in future choose, issued by a solitary quartermaster under no special authority of Congress, and, perhaps, unauthorized by law. It is, therefore, not surprising that merchant after merchant from St. Louis has testified that at that time the government was without credit in St. Louis, and that they were unwilling to sell to the quartermaster of the United States. It is also not surprising to find that many of these merchants were willing to sell their goods to the claimants and unwilling to sell to the government; for as Mr. Durkee, a banker of St. Louis at the time, puts it, "I was asked did I consider it safer to sell to Child, Pratt & Fox than the government? I gave in my opinion that it was, because they would have the government to sustain Child, Pratt & Fox, and would have those mens' private fortunes besides, for I believed they would pay the last dollar they had in the world. I felt it was better to sell them than the government, and so advised them. In other words, I thought they would get double security, just as much better as all their private fortunes were worth."

A large portion of the goods were also hurried forward from the east under the most urgent order of the chief quartermaster by express, and came consequently charged with the extra expenses of what is termed "fast freight." Finally the claimants were obliged to re-pack their goods and also to deliver them at the various camps contained in a circuit of several miles around St. Louis.

These extraordinary items of expense were not taken into account by the accountant who estimated the claimants' profits for the commission. Looking simply at the price paid in gold and the price received in vouchers, he may well have been deceived into believing the difference to have been exorbitant profits.

There is yet another item to be taken into account before condemning the claimants' sales as fraudulent, and that is that they were sales made on a "rising market." We all know the great advance in prices which occurred during the first year of the war, and when a merchant, with no excess of stock on hand, sold in the full view of such advances, on an uncertain credit and without interest it is not unreasonable that he should charge liberally

for his goods. Before this court was clothed with its present powers, the government bought on credit under two great disadvantages. One of which still exists. First, that it could not be held to the legal accountability of a private debtor. Second, that it pays no interest.

When we examine the prices charged and profits made on the various items of goods sold to the defendants, and making up the aggregate amount of $478.119, for which the claimants held vouchers, it is evident that no scale or settled rule existed. In some instances the claimants bought in St. Louis and re-sold to the government at precisely the same price they paid, making no profits whatever, and indeed suffering a loss; in others a large advance is charged The highest item of profit appears to have been 188¼ *per cent.* These items are taken from the report of the accountant who made the estimate upon which the commission acted, and this last item referred to will show the partial character of the statement. It is as follows:

	Sold.—Frying Pans.		
Sept. 1 to Oct. 1	411, at 50 cents each.	Sept. 21.	An invoice of 57 dozen cost in Pitsburg 17 1-6 cents each. Profit 188¼ per cent. on Pitsburg cost.

It is thus evident that the profit of 188¼ *per cent.* on 411 frying pans is based on what 57 dozen of the articles cost in Pittsburg, on the 21st September.

The only other item where the difference of cost and price exceeds 100 *per cent.* is that of $835 30–100 for 3,374 curry combs. Here, the "cost east" was 11 cents, and the price charged 23¼ cents; but the time of purchase and sale ranges from the 15th August to the 8th October, and there is no telling how much the articles might have advanced in the eastern market during that period.

It is hardly to be expected that where goods were bought and sold in the haste and excitement which attended these transactions that the the ordinary scrupulous care and nicety of mercantile transactions would be preserved in fixing the exact percentage of profit on each article as it was sold, and where parties thus dealt, by what was virtually a running account, the only just and proper way of estimating the profits is to ascertain the per centage on the entire mass of property sold. This has been done by the witness Mr. Coghlan, an experienced book-keeper, and his analysis of the table used by the commission shows that the price paid for the goods was $226,520.11, the price charged, and for which vouchers were given, $322,761.22, being a difference of 42 *per cent.*. Out of this difference the claimants had to pay all their expenses, and to cover their losses for interest and for payment in depreciated paper. There is, therefore, not only none of that great exhorbitancy of price which, as we held in *Beard's case*, (3 C. Cls. R, p. 122,) implies imposition or collusion, but on the contrary, the profits of these vendors, regard being paid to the peculiar circumstances of their sales, seem not unreasonable.

Finally, the evidence of the defendants to show fraud or collusion (apart from the statement of the accountant so often referred to) is of the most trivial character. One business house in St. Louis shows that they made

an effort to sell shoes to the government which they afterwards sold to Child, Pratt & Fox, and would have sold them at the same price; but the evidence is suspicious and evasive and does not show that they offered them to the chief quartermaster at the same price. Another merchant testifies at what rate he sold to Child, Pratt & Fox, but does not state that he would have sold to the government at the same price, nor that he offered to sell it at any price. A third house shows that they sold camp-kettles and mess pans to the claimants who instantly re-sold them to the government at a large advance. They also state that they offered to furnish these to the government at the same rate as to the claimants, but that their offer was refused by the chief quartermaster. This is the strongest direct evidence in the case for the defendants. Yet against it, it appears, first, that no more mess-pans and camp-kettles were purchased of the claimants after this offer was made. Second, that the chief quartermaster refused to consider the offer because he had once detected the parties in an attempt to perpetrate a fraud. In this explanation of the chief quartermaster we do not put much faith, except to show that a quarrel existed between him and this house, and thereby the spirit in which the testimony was given.

Upon the whole case, therefore, we are satisfied that there is no just ground for the suspicions which have so long prevented the claimants from receiving the agreed price of the goods they sold. More than seven years have elapsed since the last account was settled and liquidated by the parties, and more than seventy thousand dollars would be recovered for interest if the suit were against an ordinary defendant. But the law does not allow of such damages being awarded against the government, and the relief to be given is limited to the balance remaining due.

The judgment of the court is that the claimants recover one hundred and sixty-three thousand one hundred and eleven dollars, ($163,111.00).

Judge Loring. The evidence does not satisfy me that the purchases were made in open market.

Judge Peck did not sit in the case.

In the Supreme Court of the United States.

THE UNITED STATES, *Appellants*,
vs.
ALBERT MOWRY.
No. 186.

BRIEF OF CARLISLE & MCPHERSON FOR APPELLEE.

This is an appeal from a judgment of the Court of Claims in favor of the appellee.

THE CASE

presented by the finding of the Court of Claims is as follows:

That in September, 1861, a Quartermaster of the United States Army entered into a contract with the appellee, who thereby engaged to construct and deliver to the United States certain cars for use on a railroad in Missouri, at an agreed price.

That such cars were needed immediately for the public service in the transportation of troops and supplies, in the military operations of the Department of the West.

That there was no other mode of obtaining such cars than by contract for their construction.

That the appellee performed his contract and became entitled to the agreed price, which was $76,250.

That the appellee presented his account for the same to the Holt,–Davis,–Campbell Commission, who gave him a voucher for $58,750, and he receipted in writing for the

same as being, when paid, in full of all demands against the U. States: but in signing the receipt he protested against the action of said commission in his case.

The Court also finds that the contract "was *duly made by an officer of the United States*" and "*duly performed by the appellee*," and that the appellee is entitled to the balance of $17,500.

Two questions arise upon these facts:

I. Were the United States bound by the contract?

II. If yea, has the obligation thus incurred been released.

I.

The contract was made by a Quartermaster of the Army.

The Act of 28th March, 1812, section 1, creates "a Quartermaster Department," consisting of certain officers. Their duties are prescribed in section 3, one of which was under the direction of the Secretary of War, "generally to procure and provide means for the transport of the Army, its stores, &c.

2 Stat. 296.

To this "Department," Quartermasters and Assistants were added by the Act of May 18, 1826, sec. 4, and July 7, 1838, sec. 9.

4 Stat. 173.

5 Stat. 257.

The "direction of the Secretary of War" was given by general regulations. The regulations of 1861 declare that "this department [Quartermaster's] provides the quarters and *transportation of the Army*, storage, and *transportation for all Army supplies*." par. 1064.

No detailed instructions are given in the regulations upon this subject, nor was it possible to do so, but each case was left to its circumstances as to the mode of transportation.

The restrictions upon the general power of making contracts necessary for the transportation of troops are found in

par. 1004 and 1008. They require previous advertisement only in cases "where the public exigencies do not require the immediate delivery of the article." The Court in this case certifies as matter of fact that "the cars contracted for "were needed for immediate use," and "could not be pur- "chased in the market nor obtained except by contract."

We submit, therefore, that the contract being made pursuant to law and regulations was binding upon the government.

II.

Upon the second point, we refer and ask the attention of the Court to the concurring opinion of Chief Justice Casey of the Court of Claims in these cases, and to the authorities cited by him, which we extract from the reports of the Court of Claims, in 2 N. H. p. 54:

"It is finally urged upon us that though these contracts may have been originally valid and binding, the claims made upon them are barred by the proceedings under the Holt-Davis commission, and the acceptance by several of these claimants of the amounts awarded them by that board, and giving receipts in full for their entire claims. These facts have been pressed upon us earnestly in various aspects. 1st. As an arbitrament and award; 2d, as accord and satisfaction; 3d, as a compromise of doubtful and disputed rights.

1. "It has no feature whatever of a submission or arbitration. The commission was an *ex parte* one; constituted not to decide upon the validity and amount of the claims, but as to the facts and circumstances surrounding the transactions out of which they arose. It was intended to elicit facts instead of reaching conclusions or producing final results. Arbitrament always implies mutual submission of the dispute. In our case it is totally wanting. But if there had been even a concurrence in the submission by the claimants it would still be unavailing; for, to render an award binding on either party, it must be equally obligatory on both. The Secretary of War had no power to submit the rights of the United States to the arbitrament of private

and unofficial persons. He could only adjust the claims against his department through the agencies constituted by the law, or through the judicial courts of the nation. There was no law authorizing him to make and constitute such a tribunal. Hence their decisions and reports, whatever light they may have cast upon the transaction or information imparted to the department and the Secretary, had no binding force and efficacy. None upon the United States, because no law of Congress had authorized their acts; none upon the claimant as an award, because of the absence of all reciprocal obligation or mutuality. Congress alone has the power to submit the rights of the Government to arbitration, or, at least, to prescribe the mode and manner in which it shall be done. (See *Kendall* v. *The United States*, 12 Peters, 611; also, *DeGroot* v. *United States*, decided in this Court at this term.) As an award, if otherwise good, it was not binding on the United States when made, and of course not on the claimants. That Congress impliedly ratified the finding, by directing the amounts found due by the commission to be paid, could not alter the case, as it could not relate back and make that binding on the claimants which before was simply void as to both. But it never was regarded by the Secretary of War, Congress, or the claimants, in any other light than as an *ex parte* affair, adopted as the best means that suggested itself of getting full and accurate information to guide the future action of the department in adjusting or contesting the claims.

"But let us test this question a little closer. Suppose this commission, instead of deducting a large sum from the contract prices had added the same amount to them, and these suits instead of being brought upon the contracts were upon such awards, and the position of the parties be thereby reversed, the United States defending under the contracts instead of now under the award, how would the matter stand? Could the award in such case be sustained? Clearly not. And this answers the whole argument; because, if

available as a defence now, it would in the other case be equally so as a ground of suit.

2. "To support an allegation or plea of accord and satisfaction, there must be some new consideration moving from the party who sets it up. The payment of part of a debt, in consideration of the creditor relinquishing the residue, where the debt is due at the time, will not support the plea or averment. (*Warren* v. *Skinner*, 20 Conn. Rep., 559, 1 Bac. Ab., 43.) To sustain a release not under the seal, a consideration of some kind, apart from the original indebtedness, is necessary; and without such consideration it is *nuudum pactum* and void. In support of this principle there is an overflowing flood of authorities, without sufficient counter-current to make an eddy in the stream, or a ripple on its surface. The case of *Wentz* v. *De Haven*, (1 Sergt. and R., 312,) cited by the solicitor, which intimated a contrary doctrine, has been repeatedly overuled by the same court which inadvertently made it. (*Whitechill* v. *Wilson*, 3 Penn. Rep., 405; *Campbell's estate*, 7 Barr, 101; *Kennedy* v. *Barr*, 445; *Kidder* v. *Kidder*, 9 Casey, 268.) There is scarcely a State in the Union where it has not been repeatedly decided that a receipt in full is but *prima facie* evidence of payment; and that, as between the parties to it such receipt may be explained, varied, or contradicted by parol. It is equally well settled that part payment of a debt is not sufficient consideration to support a release of the residue, or an agreement not to sue for it. To cite even a tithe of the cases in which this doctrine is maintained and enforced would swell this opinion beyond due bonds. A few will suffice. The leading case, upon which the others are all grounded, is Pinnel's case. (5 Rep., 110.) In that case "it was resolved by the whole court that payment of a lesser sum on the day, in satisfaction of a greater, cannot be any satiafaction for the whole, because it appears to the judges that, by no possibility, a lesser sum can be satisfac-

tion to the plaintiff for a greater sum." "When the whole sum is due, by no intentment, the acceptance of a parcel can be satisfaction to the plaintiff."

"The case will be followed and the principle sustained by Pratt, C. J., in *Cumber* v. *Wane*. (1 Strange, 426.) And, again, more explicitly, by Lord Ellenborough, in *Fitch* v. *Sutton*. (5 East., 232.) "But it cannot be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release. It is impossible to contend that acceptance of £17 10*s*. is an extinguishment of a debt of £50. There must be some consideration for the relinquishment of the residue; something collateral to show a possibility of benefit to the party relinquishing his further claim; otherwise the agreement in *nudum pactum*. But the mere promise to pay the rest, when of ability, put the plaintiff in no better condition than he was before. It was expressly determined in *Cumber* v. *Wane* that exceptance of a security for a lesser sum cannot be pleaded in satisfaction of a greater. That decision is directly supported by the authority of Pinnel's case, which never appears to have been questioned."

"For this ruling there has scarcely been a departue up to the present day in England, where it is firmly established. And this same principle has been followed, as already stated, in nearly every State in the Union, its sound sense and justice commending it to the judgment and conscience of courts everywhere and at all times. A few of the American cases are here referred to, which will be found to sustain the doctrine to the full extent to which I apply it in this case: *Sigourney* v. *Sibles*, 21 Pick., 102; *Miller* v. *Hemgler*, 5 W. and S., 486; *Lawrence* v. *The Schuylkill Navigation Company*, 4 W. C. C.,, 526; *Moize* v. *Miller*, 1 *ibid.*, 328; *Hope* v. *Johnson*, 11 Rich. L., 199; *Kidder* v. *Kidder*, 9 Casey, 268; *Pabodie* v. *King*, 12 John., 426; *Cushing* v. *Wyman*, 44 Maine. 121; *Ryan* v. *Rand*, 6 Fost., (N. H.,) 12; *Frink* v. *Ballon*, 15 Il. Rep., 343; *Jones* v.

Rickets, 7 Md. Rep., 109; *Hardy* v. *Coe*, 5 Gill., 189; *Bailey* v. *Day*, 26 Me., 88; *Miller* v. *Holden*, 18 Vermont, 337; *Mason* v. *Peters*, 4 *ib.*, 101; and *Wheeler* v. *Wheeler*, 11 Vt., 60.

'A careful view of the English and American authorities will demonstrate, beyond a controversy, that there is no case of recognized and established authority that contravenes the principle we apply in this case. Whenever the rule and the principle have apparently been departed from, it will be found that the debt of demand was uncertain and unliquidated. Whenever, as in our cases, the amount of the claim or debt is definite and certain, the principle is invariably applied. In such cases as are unsettled, where the parties come together and agree to settle and liquidate the demand at a certain amount, and it is paid and received in full satisfaction, in good faith, it will be sustained as accord and satisfaction, or a compromise. In the case we are considered there is nothing for such a doctrine to operate upon. They are not open, unadjusted, unsettled claims that the claimants held. They were regular official vouchers, given by the quartermasters, stating in words and figures the amount due the parties, or were distinct written contracts specifying precisely the amount to be paid for materials furnished or services performed. So these claims are treated by this commission. The amount of vouchers of the claimants, or of their contracts, is plainly set down. From that amount a certain sum is arbitrarily deducted, and the proposition made, "Take this less sum in satisfaction for the whole, or get nothing." It is taken, and a receipt in full given, or an agreement signed not to sue for residue. Now where is the consideration for this promise? The demand was specific. The United States has so treated it in every instance. What the claimants received was admitted to be due to them, irrespective of this arrangement. Where, then, is the least spark or title of consideration to support and sustain these pretended releases, or accords and satisfaction?

Without regard to the manner in which they were wrung from the fears or necessities of the claimants, they are as bald and naked promises as could be presented to the consideration of a court. It is not pretended there was any new consideration. There was no change of time, place, or mode of payment. It was simply an agreement to receive a part in place of the whole of a specific liquidated claim. As such it is entirely without any binding force.

3. "The facts set up, it is alleged, if they do not constitute an award, a release, or accord, they amount to a compromise of a doubtful and disputed right. Where a party voluntarily and without any oppression or undue influence being exercised upon him by the other, relinquishes a part of a disputed claim and accepts the less sum in discharge of the whole, it is binding on him as a compromise. It is quite clear that where a dispute arises between two parties as to the validity or amount of a claim, and they in good faith mutually agree to pay and receive a certain sum, or such sum as a third party shall award, and it is voluntarily paid and accepted in discharge of the whole claim, that it is a final and binding compromise which neither will be permitted to gainsay or re-open. But such are not the facts of the cases we are considering. To make an agreement of compromise effectual it must be fair, open, and free from undue influence, oppression, and extortion. The parties must stand upon equal grounds. Not so in our cases. This alleged compromise commences and has its inception in the appointment by the War Department, without the knowledge and consent of the claimants, of this one-sided commission. Their cases are taken up either voluntarily or by compulsion. Where the party does not submit his vouchers, his claim is seized upon by the records of the quartermaster's department. The amounts are arbitrarily fixed, their papers are withheld, and they are reminded that unless they take what is offered they can neither have their papers nor the money that is admitted to be due to them. This is the com-

promise. They agreed to it because they were compelled to do so.

"It is admitted that the claimants had no voice in the selection of these commissioners, who are now called arbitrators. They did not, either before or after the report was made, agree that they should act as referees or arbitrators on their rights. They entered into no stipulation to abide by the report or award. They did more—they protested against the injustice of the decisions, and the sequestration of their vouchers and papers. It is admitted the commissioners had no right, in any view, to withhold the papers, least of all for the purpose of compelling an unwilling submission to their finding. Yet they did withhold them, and for the very purpose avowed, and apparent of forcing an acquiescence in their decision. They succeeded in obtaining that submission and acquiescence. Is this arbitrament and award? Is this accord and satisfaction? Is it compromise? The rack and torture often produced similar submissions--the like compromises—but little less odious, and not a whit more unlawful.

"It was at one time maintained that duress of the person was necessary to avoid an agreement, and that duress or detention of goods would not have that effect. That doctrine is now exploded. The case of *White* v. *Heylman* (10 Casey, 142) closely resembles the one in hand. There Heylman refused to deliver to White certain deeds and papers belonging to the latter, until he would pay him $300 in money, and give his note for two hundred more. The action was on that note. Mr. Justice Read says: "Neither the payment of the cash nor the giving of the note was voluntary, but both were extorted from the defendant, and came within that class of cases in which money illegally claimed and paid has been recovered back, where goods, deeds, or papers have been wrongfully withheld until the money has been paid."

"In *Ripley* v. *Gelston* (9 John's Rep.,201) it was held that duties illegally exacted by a collector of customs before he

would deliver the goods could be reconered back from him, although he had paid the money over into the public treasury. So in *Clinton* v, *Strong*, (19 John, 370,) of costs illegally exacted by an officer.

"In *Whetler* v. *Smith* (9 How., 55) the Supreme Court of United States set aside an alleged compromise, on the ground that the party setting it up had taken an unfair advantage of the other's necessities. Mr. Justice McLean says, on pages 82, 83: "But in making the compromise the parties did not stand on equal ground. The necessities and character of the complainant were well known to the executors."

"In *Elliott* v. *Swartwout*, (10 Peters, 137) the same court holds that duties or taxes illegally exacted by an officer, before he would deliver the parties' goods, were not voluntary payments, and could be recovere d back. (*Hearsey* v. *Pruyn*, 7 John, 179.)

"In *Ashmole* v. *Wainwright* (2 Queen's Bench Rep., 837) a common carrier refused to deliver the plaintiff his goods until he paid a sum in excess of the legal freight. He paid the sum demanded, protesting against it as exhorbitant. The court held he could recover it back in assumpsit.

"So in *Wakefield* v. *Newborn*, (6 Queen's Bench, 281,) an attorney of a martgagee had possession of certain title deeds to which the mortgagor was entitled. The attorney refused to deliver up these papers to the mortgagor until he would pay certain costs and expe nses, for which he was not legally bound, and the attorney had no right to demand. He paid the money, got possession of his papers, and he brought suit to recover it back. Lord C. J. Denman said; "the evil of allowing extortion, by means of a wrongful detention of goods, would be great; and the wrongdoer has no right to complain when he is compelled to restore money which he was warned he had no right to exact. The case is wholly different from that class of cases where the parties have to a voluntary settlement of their concerns, and have chosen

to pay what is found due." (*Cartwright* v. *Rawley*, 2 Esp., 723.) The same principle is decided and maintained with great clearness and force by Chief Justice Tindal, in *Parker* v. *The Great Western Railroad Co.*, (7 Mann and Gr., 253) Also, by the superior court of New York city in the case of *Harmony* v. *Bingham*, (1 Dues, 229,) and by the Court of Appeals in 2 Kern, 99.

"In *Shaw* v. *Wood* (7 Barn. & Cress., 73) the property illegally withheld were certain policies of insurance, upon which the party holding them claimed a lien. The owner, to get his papers, paid the amount, and sued to recover it back. The court repudiated the idea of it being a settlement or compromise. It was simply an illegal extortion. *S. P. Astley* v. *Reynolds*, (2 Strange, 915) *Atlee* v. *Backhouse*, (3 M. & W., 643.) The same doctrine was held and distinctly announced in the case of *Oats* v. *Hudson*, (5 E. L. and E. Rep., 469.)

"In the case of *Astley* v. *Reynolds* (2 Str., 915,) the court says: "We think, also, this payment by compulsion; the plaintiff might have such an immediate want of his goods that an action of trover would not do his business. Where the rule *volenti non fit injuria* is applied, it must be where the party has his freedom of exercising his will. To the effect is *Chase* v. *Dwinel*, (7 Green, 134,) and numerous other cases.

"The arguments relied on here, that the claimants need not have acquiesced in the demands made by the commissioners—that they could have sustained suits in this court without having possession of their papers, is the old defence that has been urged in all the cases cited and overruled in each of them successfully. In all such cases the party can maintain trover and conversion for his goods, and determine for his title deeds or papers: but that fact does not vary the principle. The other party shall not be permitted to take advantage of, and reap a benefit from his own wrong. It is a great fallacy to suppose that to render a promise or agree-

ment, extorted by the detention of goods or papers, unavailable and void, the other party must have been without any other remedy. The doctrine I am contending for, and the cases cited in support of it, do not rest upon any such grounds, but upon the illegality of the means by which the promise was obtained, or the agreement exacted. To present to a man the alternative of paying an extortionate sum, or of relinquishing a legal right on the one hand, or be deprived of the rightful possession of his property, or obtain it through the delay, vexation and expense of a lawsuit on the other, the law holds to be unconscionable and unlawful, and renders every promise and agreement extorted in that way wholly null and void. In our cases it is not disputed that the claimants had a right to the possession of their papers; nor was it disputed that they were entitled to be paid the amounts which they afterwards received. And in view of these facts, we are called upon to decide upon the legality and justice of withholding these papers, and the money due them, until they should agree to relinquish all claim to such part as the United States saw fit to dispute. This question has never been decided but one way by any respectable court in Christendom, holding common honesty and fair dealing require that a party shall be relieved from any bargain wrung by such means from his weakness or necessities.

"Leaving out of view entirely the withholding of the vouchers and papers, neither the legal nor moral aspect of the case is changed. It is not the law, nor is it in accordance with my views of sound morals, that where a party has a claim against another of, say, three hundred dollars, who admits that he is justly indebted in the sum of two hundred dollars, but refuses to pay it or any part of it unless the other will agree to relinquish his right to demand the balance. The debt is due; that part is undisputed. The creditor is entitled to it, without any reservation or condition. And where the other exacts and he, to obtain it,

gives a receipt in full for the entire claim, it is neither a release nor a compromise, but simply a promise, made not only without any consideration, but tainted with such illegal and inequitable conduct as renders it inoperative and void. Such, in my opinion, is the character of the receipts set up in those cases. It would be against all law, against all precedents, to sustain this as a compromise, and derogatory to the character of a great and just government, to allow such a state of facts to defeat the just claims of its citizens."

J. M. CARLISLE,
J. D. McPHERSON,
For Appellees.

Supreme Court of the United States.

DECEMBER TERM, 1868.—No. 186.

APPEAL FROM THE COURT OF CLAIMS.

THE UNITED STATES, APPELLANT,

vs.

ALBERT L. MOWRY.

ARGUMENT FOR APPELLEE.

CASE.

The defendant filed his petition in the Court of Claims, claiming to recover payment for fifty platform and fifty box cars, which he built and furnished the plaintiff under a written contract made with the quartermaster at St. Louis, on the 22d September, 1861. The cars were built, accepted, and delivered, according to contract. They were needed for immediate use for the transportation of men and supplies in the military operations of the department of the West, then in command of Major General Frémont; that the cars could not be purchased in the market, nor obtained except by contract for their construction.

Defendant, failing to obtain payment at the quartermaster's department, presented his claim to a commission, consisting of three citizens, appointed by the Secretary of War, which commission allowed him $58,750, and no more, leaving a balance of $17,500 due defendant. The sum thus allowed was endorsed on the vouchers, as allowed, which they agreed

to give him on condition that he would sign a receipt and agreement in the words following, viz: "The undersigned acknowledges to have received the vouchers referred to and described below, which, when paid, will be in full of all demands against the United States, on account of the respective claims set opposite their several names." Defendant protested against the action of the commission, and signed the receipt under protest.

ARGUMENT.

There seems to be but one question presented by the record, viz: The legal effect of signing the receipt for the vouchers.

There was no question raised of the regularity of the contract, of its validity, or of its propriety. Nor was there any question of the fulfillment of the contract: the cars having been inspected and received as all right, and put into Government service. The price was fixed by the contract, and the number of cars made and delivered under it not questioned, but agreed to; so that there is but the single question, viz: Is the receipt conclusive upon the defendant, so that he cannot set up this claim for the balance remaining unpaid.

It is to be observed that there was no claim that the amount due defendant was disputed or was the subject of controversy. There was no claim that the defendant had not well and faithfully carried out the contract in every respect; none that the contract was not regularly made, and that the cars were not delivered and received and actually used by the appellants.

Thus, it will be seen that the case is stripped of all embarrassment, *if there ever was any*, growing out of the preceding circumstances which surrounded the execution of the contract or accompanied the delivery and acceptance of the cars; and the narrow issue is presented, What is the legal effect of the receipt?

1st. The defendant signed it under protest.

2d. If he had not done so, it is manifest that it was not conclusive, but might be explained; and, if found not to be in full of the defendant's liquidated claim, it would not conclude

him from setting up his demand for payment for the balance.

This receipt is a parol agreement and must have a consideration to support it. Thus, it has been held in Pennsylvania that a parol release of a judgment is sufficient in equity, but a consideration is necessary to support it. It is not enough that it is in writing, if without a consideration. All contracts are either by specialty or parol; there is no third-class contracts in writing. If they be merely written and not specialties, they are parol, and a consideration must be proved *aliunde*, per Chief Justice Gibson,

Whitehall *vs.* Wilson, 3 Penn.
7 Barr, 100, *In re* Campbell's estate.

A receipt is but *prima facie* evidence of payment. It is always subject to explanation, and may, upon satisfactory proof, be restrained in its operations.

5 Gilman, Ill., 441.
24 Ill., 199.
4 Scammon, 40.
21 Pick., 101.

The release of a specialty debt by simple contract, and without consideration, is void.

5 Watts *vs.* Sergeant, 486, Miller *vs.* Hemler.

Unless a receipt is the result of a *compromise*, it is subject to be explained and the transaction opened up.

4 Wash. C. C. R., 562, Lawrence *vs.* the Schuylkill Navigation Co.

A release not under seal, in consideration of part payment in money of a debt past due, is no discharge of the balance, the release being without consideration.

9 Richardson's (S. C.) Rep., 135, Hope *vs.* Johnston.
Bailey *vs.* Day, 26 Maine, 88.
18 Verm., 337.
11 *Ib.*, 60.

Unless it is where the demand is unliquidated and uncertain,

the acceptance of a smaller sum will not discharge the whole debt.

Miles *vs.* Star, 2 Bail., 360.
Pinnel's Case, 5 Co., 117.
Err *vs.* Mosely, 2 Strob., 203.
Bailware *vs.* Harrison, 4 Rich. Eq., 317.
Pabodie *vs.* King, 12 Johnson, 426.

Statements in writing of the situation of the accounts between parties, *when not containing contracts*, fall within the same principle.

Ryan *vs.* Rand, 6 Foster, (N. H.,) 12.

Payment of a less sum than is due on a judgment, though received in full thereof, cannot operate as a discharge or satisfaction of the judgment.

8 Maryland, 107.
5 Gill., 189.

To enable a party to set up the defence of payment, there must be the concurring intention of the party making and the party receiving the payment. The payment must be received as well as made in satisfaction of the debt.

Cushing *vs.* Wyman, 44 Maine, 121.

Although there may be instances where individual judges may have expressed dissatisfaction with the rule, I apprehend no case can be found which is in direct and avowed conflict with it. It is too well settled, by an unbroken current of decisions, running through more than three centuries, to be shaken by a mere doubt, however respectable the source. It is firmly fortified by the warning injunction, *stare decisis;* and *omnis innovatio plus novitate perturbat quam utilitate prodest*, is a maxim too full of wisdom to be ignored at this enlightened day by a profession which strives to *settle* the law within fixed and well-defined boundaries of principle, in the light of well-considered and long-understood precedents.

Broom's Legal Maxims, 148.

The Secretary of War had no power to abate any portion of this claim by such coercive measures as were adopted in this case by the commissioners; and if he had not, manifestly these gentlemen, appointed by him to "examine and report upon all UNSETTLED CLAIMS against the military department of the West," &c., could not exercise it: more especially with respect to claims which were *liquidated*, and the *amount* fixed *in writing* by the only authority that could bind the Government for such supplies, viz: the quartermaster. He made the contract, in which the *prices* were fixed, excepted the property, and put it into the use of the Government. There was, therefore, nothing to settle. All *that* was determined by the written contract, which bound both parties. The cars were made, inspected, delivered, and accepted. Nothing remained for the Government to do, but to pay for them the *contract* price. But the order of the Secretary of War did not authorize these commissioners to ignore contracts regularly made, nor yet to fix amounts, nor determine what should or should not be paid on vouchers or contracts, nor yet determine what was a valid or an invalid contract. They were authorized to "examine and report upon all unsettled CLAIMS" for the consideration of the Secretary of War. This was the first order. The second, dated 25th November, 1861, restricted their action to the consideration of "all *just and legal claims* for supplies," &c., which, when *affirmed* by the commissioners, would be paid. All other than *just and legal* claims were to be postponed for the action of Congress. Thus, it will be seen that the Secretary, fully possessed of the case, failed to authorize them to reject any portion of "just and legal claims," but confined their power, in that particular, to such claims as were "tainted with fraud," the which would be postponed for the action of Congress.

This was not an unsettled *claim* due defendant. It was a *contract debt*, the amount of which was fixed the moment the cars were delivered. After finding that the defendant entered into a written contract with the quartermaster to furnish the Government fifty platform and fifty box-cars, strictly to the acceptance of Captain Castle, whose opinion was to be final

between the parties, as to workmanship, &c., and that the defendant delivered and the Government accepted fifty platform and fifty box-cars, which were accepted, the Court of Claims finds that the defendant is entitled to receive from the United States the *contract price* for the cars thus delivered and accepted, amounting to $76,250. Thus we see that the amount was liquidated, fixed, definite, and certain, by the concurrent act of both parties, leaving nothing to the judgment and determination of others. It was not, therefore, an unsettled claim, and did not come within the purview of the Secretary's order or instruction.

But it appears that the very voucher which these commissioners demanded this coercive receipt for, on its face, showed that there was due to defendant, *on this contract*, $76,250. The sixth finding of the Court of Claims (Record 4) is: "That the petitioner presented his claim to a commission appointed by the Secretary of War, composed of Messrs. Davis, Holt, and Campbell, and they allowed him thereof the sum of $58,750, and gave him their voucher therefor." And the eighth finding, (Record, p. 5): "That, on the said voucher, received from said commissioners, there had been paid $58,750, leaving unpaid the sum of $17,500."

Thus the court had the evidence before them that the sum paid was not in full of the contract price; but then and there was the evidence that the sum paid was less than the sum actually liquidated and due, and there is no reason in law and fact why that balance was not then paid.

EFFECT OF THE ORDER OF THE SECRETARY OF WAR, AND ITS LEGAL CONSEQUENCES CONSIDERED.

1. I am not aware of any law which authorizes the Secretary of War to make an order in the nature of a statute of limitations, barring legal claims. That power belongs to the legislature. He may, perhaps, prevent debts from being contracted and contracts from being made by his official orders; but he has no legal right to cut off valid claims, nor can he ignore them by any mere order, after they have become valid

and subsisting claims against the Government. They can be discharged in but one of two ways, viz: by payment or lapse of time, as prescribed by law. The power of the Secretary is derived from the law and the President. He is peculiarly the mouth-piece of the President, and can do no act without the President's order. The act of Congress, approved August 7, 1789, creating this officer, says he "shall perform and execute such duties as shall, from time to time, be enjoined on or intrusted to him by the President of the United States." The very fact that the Secretary went to Congress for authority to pay these claims shows the folly of the proposition, that he or his commission could legally bar the claims in whole or in part. As to legal claims, he is but an auditing officer, and his commissioners were nothing more.

In furtherance, and in affirmance of this view, I have to remark, that perhaps the most significant circumstance connected with the action of Congress, in passing the resolution to pay these claims, is to be found in the fact, that the order to pay them is limited to the sums allowed by the *Secretary of War*, thus treating the commissioners as merely the organs of the Secretary. In this respect the resolution is pointed, and cannot fail to impress upon the court the important fact, that Congress intended to do no more than order paid the claims allowed to be due by the Secretary of War. The names of the commissioners are used in the resolution only to identify the class of claims being legislated for, not to recognize their acts, except in so far as they, as the organs of the Secretary, have noted the allowance on the vouchers. If, then, they were not a judicial body, acting independently of the Secretary of War, but were mere clerks, whence comes their power to ignore legal claims and strike them dead by their mere words? Where do they derive power to set aside contracts and taboo vested rights under such contracts? The Secretary himself could do none of these things. Being the commission of his creation, how can they do these things, which he cannot do?

2. The act of presenting the claim to the commission was no more than presenting it to the Secretary of War for payment.

If they had refused to allow any of the claim, it will hardly be claimed that the defendant would have been barred from suing it. The commission had no judicial powers, any more than the Secretaay of War, and could not by any order or judgment cut off legal rights.

ACCORD AND SATISFACTION.

The position that the receipt endorsed on the voucher is good as accord and satisfaction is not tenable.

1. Because on its face it appears that the sum paid was not *in full* of the amount made out and claimed to be due to the defendant. The rule is, that the mere consent of a party to accept a satisfaction, *without an actual satisfaction*, is not sufficient to discharge the other: the accord and satisfaction must be perfect, complete, and executed; for, were it otherwise, it would only be substituting one cause of action for another, which might go on to any extent. (9 Rep., 76 b; 5 T. R., 141.)

Satisfaction must be made to the whole of the original demand, and a party will not be discharged upon performance of a satisfaction to part of such demand, the residue remaining unperformed. (1 Taunt., 526; 5 East, 230.)

DOUBTFUL CLAIMS—COMPROMISES.

But the learned solicitor of the Government assumes that this was a *doubtful* claim, and that the transactions were compromises of doubtful claims, and, therefore, the settlement will be upheld. The claim was *not* doubtful. Its validity was not questioned. Its justness not debated. The Government had received the property in the usual and ordinary way through its quartermasters. The defendant denied the right of the Government to abate a dollar of his claims, and refused to receive the money offered in full satisfaction. Now, a compromise is where both parties admit there is just ground for dispute, and their minds meet upon some mutual grounds of settlement, whereby both agree that the whole matter in dispute is settled. Here there were no such facts concurring;

but, on the contrary, on the one hand, the agents of the Government say, take this or nothing, and sign the receipt; and on the other side the defendant says. I take the money, and sign the receipt under *protest*, denying the right of the Government to compel him to take less than the whole sum named in the vouchers, in full satisfaction. To make it a legal compromise, it wanted the most essential quality, viz, the concurrence of both parties.

The proceedings of this commission cannot even be called an arbitration, for the defendant was not consulted as to who the arbitrators should be; but, on the contrary, they were appointed by the Secretary of War, without reference to the wishes and intentions or desires of the defendant. It was essentially *ex parte*.

The books are full of cases to the point, that where payment is made under compulsion, in order to obtain the restoration of property or the payment of money unjustly and illegally withheld, the money thus paid may be recovered back. I cite some of them.

Shaw *vs.* Woodcock, 7 B. & Cr., 73.
——————————— 9 D. & R., 889.
Hill *vs.* Street, and Morgan *vs.* Palmer, 2 B. and Cr., 729; 4 D. and R., 283.

And when the payment is made, or the money received under *duress or necessity*, so as to give the transaction the character of compulsion, *or one where undue advantage is taken of the parties' situation*, or where the party has not freedom in the exercise of his will.

Moses *vs.* McFarland, 2 Burr, 1005.
Smith *vs.* Bombey, cited in Doug., 696.

Here the defendant had made large outlays, and there were large balances due him. He had already been delayed in the payment so long, that he found himself *compelled* to accept the hard terms imposed or be pecuniarily ruined. Thus the demand of the commission was the taking an undue advantage

of the defendant's situation. He was not left free to exercise his will.

It is impossible for me to see upon what grounds the appellant expects to reverse this judgment. No brief has been furnished, and I have not been favored with the views of the Government counsel.

R. M. CORWINE,
Of Counsel.